# Supreme Court of the United States

No. 164

OCTOBER TERM, 1952

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DONALD M. BELL, ET AL., Petitioners,

v.

CHARLES S. SMITH, Respondent.

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## BRIEF FOR RESPONDENT

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*For the Respondent.*

September, 1952.

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SUPREME COURT OF THE UNITED STATES.

TOBER TERM, 1922. No. 164.

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DONALD M. HILL ET AL., *Petitioners,*

*v.*

CHARLES S. SMITH, *Respondent.*

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## *BRIEF FOR RESPONDENT.*

The respondent in this case submits that:

*First.* This case is without the jurisdiction of this Court cause it involves no question arising under the laws of the ited States.

*Second.* The Supreme Judicial Court of Massachusetts ided this case correctly.

Charles S. Smith, the respondent to this writ of certiorari, brought suit in the Superior Court of Massachusetts March 20, 1914, against Warren M. Hill (whose executors the petitioners are) to recover on a judgment rendered against Hill in favor of Smith on May 2, 1904, in the same court. Hill answered, setting up a discharge in bankruptcy obtained by him December 3, 1912, by which he was discharged from all provable debts except such debts as are by law excepted from the operation of a discharge in bankruptcy (p. 6). Smith filed an affidavit that the schedule filed by Hill in the bankruptcy proceedings referred to did not contain Smith's name, which was known to Hill, and that Smith did not have notice or actual knowledge of the bankruptcy proceedings (p. 7). Hill filed a counter affidavit alleging that he was discharged from the plaintiff's claim, but not denying the allegations of Smith's affidavit as to his knowledge of Smith's name and its absence from the schedule and his lack of notice or knowledge of the proceedings (p. 9). Hill died, and the petitioners, his executors, were summoned in as defendants. At the trial, the plaintiff proved the judgment, the defendants proved the discharge, and the plaintiff proved by the schedule that his name was not on Hill's schedule of creditors. There was no other evidence.

The defendants submitted requests for rulings, all of which the Court granted except the third and fourth, namely, that the burden is upon the plaintiff to show that he was not notified of the defendants' bankruptcy, and that he had no knowledge of the defendants' bankruptcy (p. 14).

The refusal of these requests is the only error alleged in the case. The Court gave judgment for the plaintiff. The defendants took the case by Bill of Exceptions to the Supreme Judicial Court. That Court overruled the exceptions. Judgment was entered for the plaintiff for $9,891.38 (p. 17).

The defendants applied to this Court for a writ of certiorari. The plaintiff did not appear. This Court granted the writ.

*FIRST.*

THIS CASE IS WITHOUT THE JURISDICTION OF THIS COURT BECAUSE IT INVOLVES NO QUESTION ARISING UNDER THE LAWS OF THE UNITED STATES.

The defendants' only grievance is that the State Court refused to rule that the burden was on the plaintiff to show lack of notice or knowledge of the defendants' bankruptcy (p. 14).

This does not involve any question of substantive law and much less any law of the United States. Smith had a judgment against Hill. Hill had a discharge in bankruptcy. The effect of that discharge was not in dispute. It was determined by the language of the Bankruptcy Act, clear beyond the need of any interpretation, namely:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."
>
> *Act of 1898*, Ch. 541, Sec. 17 (a), 30 Statutes, 550; amended by *Act of 1903*, Ch. 487, Sec. 5, 32 Statutes, 798.

This section provides expressly that the non-scheduled Smith's claim is not barred unless he had notice or knoweldge of the proceedings. The only question which the defendants raved was whether Smith must show that he had not, or the defendants must show that he had, such notice or knowledge. This involves no interpretation of the Bankruptcy Act, and no effect of the discharge. It involves only a question of showing. The defendants' third and fourth requests do not suggest a claim that the law governing this evidential matter in a Massachusetts court is derived from the United States.

The Supreme Judicial Court in its opinion deals with the question as one of the law of proof which prevails in a Massachusetts court (p. 22). It is of course necessary to look at the Bankruptcy Act in order to determine what facts are relevant, but that statute is not one dealing with evidence and does not purport to deal with the question of which party must prove or disprove the relevant facts or produce evidence thereof.

It is well settled that a case turning on a ruling relating to proof, procedure or local practice, even though Federal rights are involved, does not raise any Federal question, and is not within the jurisdiction of this Court.

*Egan* v. *MacDonald*, 246 U. S. 227, 230.
*Turner* v. *New York*, 168 U. S. 90, 95.
*Washington* v. *Miller*, 235 U. S. 422, 429.

Neither does the mere fact that a defense is based on a law of the United States give this Court jurisdiction if the case involves no question as to the validity, construction or effect of this law.

*Norton* v. *Whiteside*, 239 U. S. 144.
*Hull* v. *Burr*, 234 U. S. 712, 720.
*Shulthis* v. *McDonald*, 225 U. S. 561.
*McGilvra* v. *Ross*, 215 U. S. 71.
*Mammoth Mining Co.* v. *Grand Central Mining Co.*, 213 U. S. 72.
*Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

The question in the case at bar was far removed from one of validity, construction or effect of any law of the United States. Indeed, on the facts presented to the Court there was no evidence whatever upon which it could base a finding that the plaintiff had knowledge of the bankruptcy. Applying the Massachusetts rule as to the respective duties of the parties to offer proof, the Court could only find in the absence of evidence to the contrary that the plaintiff had no notice or

nowledge of the bankruptcy proceedings. This in effect as the finding of fact on which the judgment of the Court as based. That being the case, there was no room for interetation of the statute, the terms as applied to such circumances being explicit.

In *Birkett* v. *Columbia Bank*, 195 U. S. 345, this Court based s decision exclusively on the finding of the state court relating o lack of knowledge, although in that case it was argued by ounsel that the rule as to burden of proof should affect the esult, and the same view was taken by the dissenting opinion f the state court.

*Columbia Bank* v. *Birkett*, 174 N. Y. 112.

Although not put in evidence at the trial, the trial court new from the plaintiff's affidavit in the Record that the plainff did not have notice or knowledge of the defendant's bankuptcy. The case before this Court approaches a moot case. reversal of the judgment would be followed by the plainff's testimony according to his affidavit, and a reentry of ne same judgment. The sole question for the trial court was ho should ask of the plaintiff Smith the question, "Did you ave knowledge of this bankruptcy?" The trial court deded that the proper procedure was for the defendant to ask uch question, or otherwise show notice or knowledge. This as merely a question of the order of proof.

The defendants' requests for instructions to the contrary id not mention validity, construction or effect of the Bankuptcy Law. These two requests attract attention to the der of procedure, the burden "to show," in a Massachusetts ourt only. A judge, giving or refusing such requests, would ot suppose that he was construing or giving effect to a bankuptcy act, too plain at this point to require any construction to leave any question as to its effect.

*Kreitlein* v. *Ferger*, 238 U. S. 21, is cited by the petitioners o show that the Court has jurisdiction. The distinction be-

tween that case and the one at bar is that it involved an interpretation of the Bankruptcy Act and a decision as to its requirements. It did not have to do with probative requirements. The questions involved were, (1) whether the debt at hand was upon a contract, express or implied, within the meaning of those words as used in the Bankruptcy Act; (2) whether a description of a debt as an account for merchandise sufficiently described a judgment for damages in a larger amount rendered on that account; (3) whether "C." Ferger, without other indication of the first name, is a sufficient naming of the creditor; and (4) whether "Indianapolis," without street or number, is a sufficient address. These are all questions as to the meaning and requirements of the Bankruptcy Act.

The same distinction exists in *Crawford* v. *Burke*, 195 U. S. 176; *Neal* v. *Clark*, 95 U. S. 704, cited for the petitioners.

There is no law of the United States which would prevent a Massachusetts Court from holding that when a man sues on one of its judgments, he is entitled to a judgment unless the defendant shows all the facts necessary to prevent. If such a ruling is erroneous, it is an error of Massachusetts procedural law only.

The Bankruptcy Law conferred on the defendant no right or privilege to compel a Massachusetts Court to relieve him from showing that his Massachusetts judgment creditor had succeeded in getting notice of his bankruptcy, notwithstanding that the bankrupt had omitted the judgment creditor from the schedule. The only right or privilege conferred, as to non-scheduled creditors, was to have the Massachusetts Court treat the discharge as a bar as to those claims as to which it is a bar, namely, the claims of those creditors who have notice or knowledge. As to how or by whom this notice or lack thereof shall be shown, the Bankruptcy Act says not.

*SECOND.*

## THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DECIDED THIS CASE CORRECTLY.

The only question presented to the Supreme Judicial Court was whether the Superior Court erred in refusing to give the third and fourth requests for ruling, namely, that the burden is upon the plaintiff to show that he was not notified of the defendant's bankruptcy and that he had no knowledge of it (p. 14).

Attention is called to the narrowness of this question because the petitioners in their brief have argued other questions that are not raised by the requests for rulings. They urge that the Court erred in presuming (1) that the claim was not scheduled, although the evidence showed that the creditor's name was not, and (2) that the bankrupt knew the name of this creditor. No ruling was presented to raise any such question in the Superior Court, and there is nothing to indicate that the Court made any such presumption.

There was no request for a ruling that upon all the evidence the plaintiff was not entitled to a finding. The bill of exceptions purports to state all of the requests for rulings of law and how each was disposed of, and there is no request contained therein for a ruling on all the evidence. There is no request for a ruling that there was not sufficient evidence to prove that the plaintiff's claim was not properly scheduled. There is no request relating in any respect to what evidence was necessary to prove that the plaintiff's claim was not scheduled except the fifth request and this was expressly *waived* (p. 14).

The only exceptions which the defendants took were to the refusal to give the third and fourth requests for rulings. These in no wise relate to the question of whether the plaintiff's claim was scheduled. The statement in the bill of exceptions, "the defendants being aggrieved by such finding" (p. 15), is merely the usual formal way of stating that the result of such adverse rulings as were made and excepted to was prejudicial to the defendants. The bill does not purport to state that any exception was taken to the findings.

It is well settled in Massachusetts that where no ruling has been asked for prior to the finding, it is too late, after it has been made, to except to the finding on the ground that it is not warranted by the evidence.

*Keohane, Petitioner,* 179 Mass. 69.
*Richards* v. *Appley,* 187 Mass. 521.

There is no provision of law in Massachusetts permitting exceptions to a finding.

*Porter* v. *Porter,* 236 Mass. 422.

Thus, in accordance with its well-established practice, the Supreme Judicial Court of Massachusetts did not purport to deal with the question of whether there was sufficient evidence to show that the plaintiff's claim was not scheduled. The Court expressly says, "The questions presented relate wholly to the burden of proof" (p. 21). The Court does not discuss the question of scheduling. Evidently the Court did not regard that question as before it. The Record does not show that it was, or that the defendants attempted to present it.

On the contrary, the brief for the defendants before that Court shows that it was not. That brief says:

"THE ISSUE INVOLVED.

"In view of the foregoing facts as shown by the Record, the sole issue in this case appears to be whether or not the Court below erred as a matter of law in refusing to give the defendant's requests numbered 3 and 4 relative to the burden of proof on the question of the plaintiffs' notification of, or knowledge concerning, the bankruptcy of Warren M. Hill. . . . "

"II.

"The defendant's testator failed to schedule the plaintiff's debt, but this was not material if the creditor had notice or actual knowledge of the bankruptcy proceedings. . . . "

In accordance with its invariable practice, the Supreme Judicial Court of Massachusetts would have treated all other questions as waived.

*Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313, 329.
*Pope & Cottle Co.* v. *Wheelwright*, 240 Mass. 221, 225.
*Ryder* v. *Ellis*, 241 Mass. 50, 60.

Also the fact of Hill's knowledge of Smith's name was evident. The plaintiff had recovered judgment against the defendant in Boston, the place of the defendant's residence. The plaintiff is described as living in the same small town near Boston in which he had lived at the time he recovered judgment. The defendant in his affidavit of defense does not allege that he did not know of this judgment (p. 9). The judgment raised a presumption of regularity, from which it

must necessarily be inferred that the defendant in that action had notice of the suit, and hence must know the plaintiff's name. In the absence of denial by the defendant, the evidence was sufficient to warrant a finding that the defendant knew the plaintiff's name. There is nothing to suggest that the claim was scheduled under another name. If it had been, this would have been pointed out while the schedules were before the trial court. The question, however, is not before this Court, because no request for rulings presents it and it was not passed upon by the Supreme Judicial Court.

The petitioners urge that the plaintiff's knowledge of the bankruptcy was a matter peculiarly within his own knowledge and that a presumption of such knowledge, therefore, arises from his failure to deny knowledge. The petitioners call attention in this connection to the fact that the affidavit of no defense filed by the plaintiff (p. 7) could not be considered as evidence in the plaintiff's favor of the facts stated in it. It is true that the affidavit is not evidence in the plaintiff's favor, but it is forceful to prevent the arising of any presumption of knowledge from failure to deny knowledge. The usefulness to the plaintiff of these affidavits goes further, however. After the plaintiff had filed his affidavit that he did not have notice or knowledge of the proceedings (p. 7), the defendant attempted as best he could to meet that affidavit by his own counter-affidavit (p. 9), and in his counter-affidavit he does not deny the plaintiff's statement. This amounts to an admission by the defendant, by omission, that the plaintiff had no notice or knowledge.

On the only question that was before the Massachusetts Court — that is, whether the burden to show lack of notice and lack of knowledge was on the plaintiff, an *unscheduled* creditor — it is submitted that the Massachusetts Court decided correctly. This is supported by all the authorities in point, which have been cited.

*Smith* v. *Hill*, 232 Mass. 188; Record, p. 20.
*Parker* v. *Murphy*, 215 Mass. 72, 75, semble.
*Bailey's Adm.* v. *Gleason*, 76 Vt. 115, 118.
*Wineman* v. *Fisher*, 135 Mich. 604, 608.
*Sloan* v. *Grollman*, 113 Md. 192, 194.
*Calmenson* v. *Moudry*, 137 Minn. 123, 126.
*Armstrong* v. *Sweeney*, 73 Neb. 775.
*Bogart* v. *Cowboy State Bank & Trust Co.*, 182 S. W. 678, 682.
*Bunting Stone Hardware Co., Inc.* v. *Alexander*, 190 S. W. 1152, 1153.
*Collins* v. *Crews*, 3 Ga. App. 238.

The decision follows the fundamental principle that the burden of proving an affirmative case is upon the plaintiff, and of proving an affirmative defense is on the defendant. The defendant by proving his discharge established a complete defense, until the plaintiff showed that he was in an exceptional position not covered by the discharge, namely, that he had not been scheduled. He thereby showed himself to be in a position where the discharge did not bar his claim. Just as the burden was on the plaintiff to show the exception on which he relied, so equally the burden was then on the defendant to show the exception on which he relied, namely, that the plaintiff was excepted from his exceptional position by the fact that he had notice or knowledge of the bankruptcy. The same principle which put upon the plaintiff the burden of

showing the exception which took the plaintiff out of the effect of the discharge, put upon the defendant the burden of showing the exception which put the plaintiff back within the effect of the discharge.

The cases cited for the petitioners do not support their contention. They are cases in which it had *not* been shown that the creditor who sought to escape the discharge had *not been scheduled.* On the contrary, they are cases in which there was no evidence as to whether or not the creditor had been scheduled. This is true of *Matter of Peterson,* 137 App. Div. (N. Y.) 435; *Larsen* v. *Hyman,* 126 N. Y. S. 100; *Niles* v. *Havens,* 190 N. Y. S. 656; *Laffoon* v. *Kerner,* 138 N. C. 281; *Manheim* v. *Loewe,* 173 N. Y. S. 260; and *Bank of Lafayette* v. *Phipps,* 101 S. E. 696 (Ga. App.). In *Alling* v. *Straka,* 118 Ill. App. 184, the error consisted of excluding the discharge entirely and of refusing to permit the bankrupt to show that the creditor had knowledge. In *Steele* v. *Thalheimer,* 74 Ark. 516, the debt was scheduled, the decision relating exclusively to the effect of an incorrect address. *Thompson* v. *Caverly,* 148 Ill. App. 295, merely holds that parol evidence is incompetent to prove the contents of a bankruptcy schedule and contains no dicta supporting petitioner's contention; *Van Norman* v. *Young,* 228 Ill. 425, involves only the question of who has the burden of proving that the debt was fraudulently contracted. In *Morency* v. *Landry,* 79 N. H. 305, 108 Atl. 855, no known creditor had been omitted from the schedule. There is no intimation in the opinion that the burden is upon a non-scheduled creditor to show that he did not have knowledge. The Court held only that where the creditor whose rights were those of an assignee only had failed to introduce any evidence that the bankrupt knew of the assignment and

so knew that the assignee was a creditor, it was unnecessary to consider whether or not the finding of actual notice was warranted by the evidence. In *Delta Co. Bank* v. *McGranahan*, 37 Wash. 307, it appeared affirmatively that the creditor had due notice and actual knowledge of the bankruptcy proceedings. On an inspection of these opinions it is apparent that the concession of the Massachusetts Court (232 Mass. 192; Record, p. 23) that there are contrary decisions is not required by the decisions cited. This is not a matter on which there is actual conflict of authority.

None of the cases cited decides that a *non-scheduled* creditor must show that he did not have notice.

*Kreitlein* v. *Ferger*, 238 U. S. 21, gives no support to the petitioner's theory. The Court deals merely with the sufficiency of the description in the schedules and reaches the conclusion that the creditor was duly scheduled. The statement of the Court that the introduction of the certificate of discharge makes out a *prima facie* defense was followed in the case at bar (Request No. 1, p. 14), but the plaintiff met this *prima facie* defense by showing that he was *not scheduled*. There is no suggestion in the opinion in *Kreitlein* v. *Ferger* that after the plaintiff has met the *prima facie* defense by showing that he was not scheduled, he has the further burden to show also that in addition to this irregularity he got no notice. After the creditor has shown that the bankrupt has done his best to keep notice from the creditor by leaving him off the schedule, he is not obliged to go further and show that the bankrupt was successful in keeping him in ignorance.

The provisions of Section 21 (f) of the Bankruptcy Act, that the certified copy of the order of discharge "shall be evidence of the jurisdiction of the Court, the regularity of the proceedings and of the fact that the order was made," has no bearing on the case at bar. It may be conceded that the order of discharge was evidence of the regularity of the proceedings, including proper scheduling of the name of the plaintiff as a creditor. That evidence was met by the positive proof that his name had not been scheduled. Obviously the discharge was not evidence that an unscheduled creditor had received notice. No "regularity of proceedings" would give notice to a non-scheduled creditor.

If the trial court had been requested to make specific findings, these would necessarily have been substantially as follows: The plaintiff obtained a valid judgment against the defendant which remains unsatisfied. Subsequently thereto the defendant was duly discharged in bankruptcy proceedings. The name of the plaintiff, though known to the defendant, was not duly scheduled in such proceedings and there is no evidence that the plaintiff had any notice or knowledge of the bankruptcy proceedings. Applying the terms of the statute to such findings, no other result could follow than judgment for the plaintiff.

The statute says:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . have not been duly scheduled . . . with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . ."

This necessarily requires, in order to bar a debt, that it be possible for the Court to find that a non-scheduled creditor had such notice or knowledge.

A bankrupt who knows the name of a creditor and omits to schedule him cannot have a discharge from the claim of that creditor unless the bankrupt can show that by some happy accident, or otherwise, the creditor had notice or knowledge of the bankruptcy and so did not suffer by this omission from the schedule.

Respectfully submitted,

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